No. 22492

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SOUTHERN CALIFORNIA EDISON COMPANY,
a corporation,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS APPELLEE

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OPINION BELOW

The district court did not write an opinion. Its order, dated September 29, 1967, granting summary judgment in favor of plaintiff with findings of fact and conclusions of law, appears at pages 179-185 of the record.

JURISDICTION

Jurisdiction of the district court over this action brought by the United States rested on 28 U.S.C. sec. 1345. Summary judgment was entered on September 29, 1967 (R. 186). Notice of appeal was filed November 9, 1967 (R. 187). Jurisdiction of this Court rests on 28 U.S.C. sec. 1291.

QUESTIONS PRESENTED

1. Whether the Secretary of Agriculture, as guardian of the national forests, was authorized to require permittees for electrical power lines in the forests to assume absolute liability for fire suppression costs of electrical fires.

2. Whether, having obtained the benefits of a special use permit wherein it assumed absolute liability for all costs, Edison is now estopped from repudiating its burdens.

CONSTITUTION AND STATUTES INVOLVED

Article IV, Section 3, clause 2, of the United States Constitution, reads in pertinent part:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; * * *.

The Organic Administration Act of June 4, 1897, 30 Stat. 35, as amended, 16 U.S.C. sec. 551, provides in pertinent part:

> The Secretary of Agriculture shall make provisions for the protection against destruction by fire and depredations upon the public forests and national forests which may have been set aside or which may be hereafter set aside * * * and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and preserve the forests thereon from destruction * * *.

The Act of February 15, 1901, 31 Stat. 790, as amended, 16 U.S.C. sec. 522, provides in pertinent part:

> The Secretary of Agriculture is authorized and empowered, under general regulations to be fixed by him, to permit the use of rights of way through the national forests for electrical plants, poles, and lines for the generation and distribution of electrical power, * * *.

The Act of March 4, 1911, 36 Stat. 1253, as amended, 16 U.S.C. sec. 523, provides in relevant part:

> The head of the department having jurisdiction over the lands be, and he hereby is, authorized and empowered, under general regulations to be fixed by him, to grant an easement for rights-of-way, for a period not exceeding fifty years from the date of the issuance of such grant, over, across and upon the public lands, national forests and reservations of the United States for electrical poles and lines for the transmission and distribution of electrical power * * *: Provided, That such right-of-way shall be allowed within or through any national park, national forest * * * only upon the approval of the chief officer of the department under whose supervision or control such reservation falls, and upon a finding by him that the same is not a finding incompatible with the public interest; * * *

STATEMENT

The United States brought this action to recover from Edison expenses incurred by the United States Forest Service in extinguishing a forest fire originating from appellant's right of way located in the San Bernardino National Forest, appellee's property.

This case is of great importance to the Forest Service because it involves the interpretation of the "high hazard" clause which the Forest Service has since 1916 required be

included in special use permits granting rights of way through national forests for electrical transmission lines (R. 143). The Forest Service has uniformly interpreted such "high hazard" clauses as imposing upon permittees absolute liability for all costs incurred, including costs of fire suppression, from electrically caused fires. Several thousand such special use permits are now extant throughout the United States.

The special use permit before the court, dated October 8, 1962, granted to Edison a 15-foot right of way within the San Bernardino National Forest to construct, maintain and operate an electrical transmission line. It was executed for the Forest Service by the Acting Forest Supervisor and for Edison by a Vice President (R. 9, 16, 113, 116).

Printed Condition No. 8, requiring the permittee to exercise "due diligence" and obligating it to pay the United States for any damage resulting from negligence, was stricken (R. 16, 133). In place thereof, a typewritten "high hazard" clause imposing on Edison absolute liability for any damage regardless of fault was substituted, reading as follows (R. 7, 17, 114):

> The permittees shall pay the United States for any damage resulting from this use.

Edison was fully familiar with the terms and meaning of "high hazard" clauses; for approximately five years previousl

Edison had negotiated a similar right of way permit with the Forest Service. Edison had then requested the deletion of the "high hazard" clause. The Regional Forester had written to Edison informing it that this could not be done and explained that under this clause Edison would be liable for fire suppression costs regardless of negligence. (R. 145-146.)

The district court found that the permit was a complete contract to be construed on its face; that the assumption of absolute liability by Edison in the "high hazard" clause was clear and unambiguous; that by stipulation the fire was electric in source, not the result of defendant's negligence, but emanated from Edison's electric lines erected and maintained pursuant to the special use permit; and that Edison's assertion, that the enforcement of the terms of the contract imposing absolute liability on it would be unconstitutional, was insubstantial and without merit (R. 180-184). This appeal followed.

SUMMARY OF ARGUMENT

I

The United States is the owner of the public lands. The Constitution commits to Congress the power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States. The Supreme Court has consistently recognized that Congress has plenary power to dispose of the public lands upon such terms and conditions as the public interest requires. The United States is

not required, if it bestows a bounty or permits the use of its property, to refrain from imposing any conditions or limitation The power to grant or withhold privileges comprehends the power to impose reasonable conditions which are germane to the objectives of the grant or relevant to the federal interest in the property being used or dispensed.

This power is delegable. Congress has vested the Secretary of Agriculture with the duty of preserving the national forests from destruction by fire and other depredations. It has granted him discretionary power to regulate the use and occupancy of the forests. Congress has also empowered the Secretary, pursuant to regulations to be fixed by him, to grant righ of way through national forests for electrical transmission lin

The Secretary's policy requiring the imposition of absolute liability for electrically caused fires upon permittees is, considering the formidable hazard and immense economic toll taken by forest fires, an appropriate exercise of his discretio relevant to the protection of the interests of the United State

II

Having agreed to assume absolute liability for electrically caused fires, and having accepted the benefits of the right of way permit, Edison is now estopped from resisting enforcement of this agreement by asserting that the agreement is invalid on the basis of alleged unconstitutionality.

III

The agreement does not violate the Constitution, does not deprive Edison of its property without due process of law and does not deny to it equal protection of the laws. The special use permit clearly imposed absolute liability on Edison for fire suppression costs. All material issues of fact were stipulated, including damages. Summary judgment was therefore proper.

ARGUMENT

I

THE SECRETARY OF AGRICULTURE WAS VALIDLY AUTHORIZED TO REQUIRE POWER LINE PERMITTEES IN NATIONAL FORESTS TO ASSUME ABSOLUTE LIABILITY FOR COSTS OF SUPPRESSING ELECTRICALLY CAUSED FIRES

A. The statutes are constitutional. - Congress enjoys broad and sweeping powers over the lands of the United States. Article IV, Section 3, of the Constitution, commits to Congress the power "to dispose of and make all needful rules and regulations" respecting the lands of the United States. The Government's power of disposal is absolute. "No one has ever contested its supreme right to dispose of its own property in its own way." McClung v. Silliman, 6 Wheat. 598, 605 (1821); see also United States v. California, 332 U.S. 19, 27 (1947). "The Nation is an owner, and has made Congress the principal agent to dispose

of its property." Butte City Water Co. v. Baker, 196 U.S. 119, 126 (1905). Thus, in Gibson v. Chouteau, 13 Wall. 92, 99 (1872) the Supreme Court wrote:

> With respect to the public domain, the Constitution vests in Congress the power of disposition and of making all needful rules and regulations. That power is subject to no limitations. Congress has the absolute power to prescribe the times, the conditions, and the mode of transferring this property, or any part of it, * * *.

In sustaining the constitutionality of a provision of the Homestead Act of 1862, exempting homestead lands from satisfaction of any debt contracted prior to the issuance of such patent, the Supreme Court in Ruddy v. Rossi, 248 U.S. 104, 106 (1918), stated:

> [I]t is settled that Congress has plenary power to dispose of public lands. United States v. Gratiot, 14 Pet. 526, 537. They may be leased, sold or given away upon such terms and conditions as the public interests require.

So, too, in Utah Power & Light Co. v. United States, 243 U.S. 389 (1917), the United States was granted an injunction against defendant's unauthorized occupancy of rights of way for electrical power lines through public lands and awarded compensation for past use. With respect to the lands of the United States the Supreme Court sustained (at 405) the power of the Federal Government "to control their occupancy and use, to

protect them from trespass and injury and to prescribe the conditions upon which others may obtain rights in them * * *."

The unfettered power of Congress to dispose of the public lands is beyond the reach of the other branches of the Government. As this Court wrote in Standard Oil Co. of California v. United States, 107 F.2d 402, 409 (1939), cert. den., 309 U.S. 654: "The disposal of the public lands is not a subject over which the 'judicial power' of the United States is extended. It is a field in which the authority of Congress is supreme * * *." For this reason States not benefited by the Submerged Lands Act of 1953, 67 Stat. 29, 43 U.S.C. secs. 1301-1315, were denied leave to file complaints in the Supreme Court challenging that Act's constitutionality. Alabama v. Texas, 347 U.S. 272 (1954).

As an incident to its ownership and unfettered power over federal lands, Congress may take such steps as it deems necessary to protect the public lands. It may prevent unauthorized mining, United States v. Gear, 3 How. 120 (1845); it may enjoin grazing without a permit, United States v. Grimaud, 220 U.S. 506 (1911); it may prohibit fencing of adjoining private lands in a manner which renders public land nearly inaccessible, Camfield v. United States, 167 U.S. 518 (1897); it may bar patients of unregistered physicians from using waters of federally-owned hot springs, Van Lear v. Eisele, 126 Fed. 823 (C.C. E.D. Ark. 1903); it may, in derogation of state game laws, authorize

the killing of surplus deer whose foraging threatens injury to a national forest, Hunt v. United States, 278 U.S. 96 (1928); and it may punish adjoining landowners leaving fires on private land extinguished which imperil public forests, United States v. Alford, 274 U.S. 264 (1927).

Since the control and disposition of the lands of the United States are lodged exclusively in Congress, it may impose such reasonable conditions upon any use or grant as it sees fit. "The Government may dispose of its bounty on such terms as it sees fit * * *." Ickes v. Underwood, 141 F.2d 546, 548 (C.A. D.C. 1944).[1/] The Supreme Court has sustained the right of the Federal Power Commission to require a utility using a right of way on public lands to agree to carry government power over its lines. Federal Power Commission v. Idaho Power Co., 344 U.S. 17 (1952). Pursuant to federal reclamation laws the Secretary of the Interior may impose certain conditions in contracts. Ivanhoe Irrig. Dist. v. McCracken, 357 U.S. 275, 295 (1958). The power to approve or disapprove includes the power to condition its approval and to set any conditions it deems necessary for the general welfare. So in Southern Pac. Co. v. Olympian Co., 260 U.S. 205 (1922), the Supreme Court sustained

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1/ The Court went on to add the following: "* * * and the executive agency which Congress has chosen for the purpose of giving away public lands and mineral deposits is peculiarly equipped, in terms of experience and administrative capacity, to act in its behalf. When an executive agency acts in this capacity, there is, perhaps, less reason than in any other type of administrative action to subject its determinations to judicial review."

the Secretary of War's conditional approval of the construction of a new bridge upon the demolition and removal of an old bridge which threatened navigation. Congress may even attach terms and conditions to the disposition of federal property to accomplish indirectly those objectives which it could not achieve directly. Thus, in United States v. San Francisco, 310 U.S. 16 (1940), the United States, under the Raker Act, granted to San Francisco certain lands and rights of way over federal property for use as a municipal water supply and for production of electricity. This grant, however, was conditioned upon the prohibition against the City transferring to any public utility the right to sell electrical power produced under this grant. In sustaining this conditional grant by Congress, the Supreme Court wrote (at 29-30):

> The power over the public land thus entrusted to Congress is without limitations. "And it is not for the courts to say how that trust shall be administered. That is for Congress to determine." Thus, Congress may constitutionally limit the disposition of the public domain to a manner consistent with its views of public policy. And the policy to govern disposal of rights to develop hydroelectric power in such public lands may, if Congress chooses, be one designed to avoid monopoly and to bring about a wide-spread distribution of benefits. The statutory requirement that Hetch-Hetchy power be publicly distributed does not represent an exercise of a general control over public policy in a State but instead only an exercise of the complete power which Congress has over particular property entrusted to it. 2/

2/ Fox River Co. v. Railroad Commission, 274 U.S. 651, 657 (1926); and Currin v. Wallace, 306 U.S. 1, 14 (1939), also demonstrate that when plenary power over a subject is enjoyed, grants of privileges therein may properly be conditioned.

That Congress may delegate to the executive its power over public lands is unquestioned. Best v. Humboldt Mining Co., 371 U.S. 334, 336-338 (1963). The foregoing authorities clearly sustain the constitutional prerogative of Congress to empower the Secretary of Agriculture to supervise and control the national forests. See also United States v. Grimaud, 220 U.S. 506 (1911). We now show that Congress has done so, and that the delegation encompasses the authority to condition privileged use of the national forests by imposing strict liability for damage.

B. The statutes authorize the imposition of absolute liability for fire suppression costs as a condition of Edison's use of the national forests for its electrical power lines. - Congress has directed the Secretary of Agriculture to "make provisions for the protection against destruction by fire and depredations upon the public forests and national forests * * * to regulate their occupancy and use and preserve the forests thereon from destruction."[3] He has been "authorized and empowered, under general regulations to be fixed by him, to permit the use of rights of way through the national forests for electrical plants, poles, and lines for the generation and distribution of electrical power."[4]

3/ Organic Administration Act of June 4, 1897, 30 Stat. 35, as amended, 16 U.S.C. sec. 551.

4/ Act of February 15, 1901, 31 Stat. 790, as amended, 16 U.S.C. sec. 522. See also Act of March 4, 1911, 36 Stat. 1253, 16 U.S.C. sec. 523.

Clearly the Secretary is directed to exercise discretion and judgment in adopting policies calculated to achieve the purposes of these Acts. See McMichael v. United States, 355 F.2d 283 (C.A. 9, 1965); Forbes v. United States, 125 F.2d 404 (C.A. 9, 1942). Special use permits containing "high hazard" clauses, whereby permittees who obtain rights of way for passage of electricity through national forests agree to assume absolute liability for electrically caused fires, have been in force since 1916, as a matter of policy. In addition to being within the ambit of the statutes, the Secretary's policy, in force for over 50 years, is supported by a presumption of the existence of facts justifying the policy. Thompson v. Consolidated Gas Co., 300 U.S. 55, 69 (1937); Pacific States Co. v. White, 296 U.S.176, 185 (1935).

If the presumption of validity is to be rebutted, the facts relied on to overturn the presumption must be specifically set forth. Aetna Insurance Co. v. Hyde, 275 U.S. 440, 447 (1928); O'Gorman & Young, Inc. v. Hartford Fire Insurance Co., 282 U.S. 251, 257 (1931); Hegeman Farms Corp. v. Baldwin, 293 U.S. 163, 170 (1934). This, appellant has not done.

Nearly 70 years ago the Supreme Court announced the doctrine that regulations cannot be invalidated unless they are plainly inconsistent with the law. In Boske v. Comingore, 177 U.S. 459, 470 (1900), the Court stated:

> At any rate, the Secretary deemed the regulation in question a wise and proper one, and we cannot perceive that his action was beyond the authority conferred upon him by Congress. In determining whether the regulations promulgated by him are consistent with law, we must apply the rule of decision which controls when an act of Congress is assailed as not being within the powers conferred upon it by the Constitution; that is to say, a regulation adopted * * * should not be disregarded or annulled unless, in the judgment of the court, it is plainly and palpably inconsistent with law. Those who insist that such a regulation is invalid must make its invalidity so manifest that the court has no choice except to hold that the Secretary has exceeded his authority and employed means that are not at all appropriate to the end specified in the act of Congress. [Emphasis supplied.]

The "high hazard" clause, long expressed in terms of policy, has been deemed necessary. It does not conflict with the authority conferred by Congress. Appellant has not met its burden of showing the contrary.

C. Imposition of absolute liability on Edison is a reasonable condition relevant to the protection of the national forests. - The reasonableness of the policy behind the imposition of absolute liability on high hazard permittees in national forests is readily apparent. The greatest threat to the national forests is fire. In cases of fires originating from electrical power lines it is often extremely difficult, if not impossible, to prove negligence even where it exists. It is quite proper, therefore, to require those who create peril for profit by using

dangerous instruments, to be required to bear any loss caused thereby.

Fires represent a major threat to forests. In the words of Justice Holmes, they have been "one of the great economic misfortunes of the country." United States v. Alford, 274 U.S. 264, 269 (1927). Between 1961 and 1965, 11,702 forest fires annually burned an average of 138,868 acres. In 1966, the number of acres burned increased to 332,921. In California, forest fires are particularly destructive. The damage to California ($7,942,200) was nearly six times that of the next state, Idaho.[5/]

Courts have recognized California's particular susceptibility to forest fires. In Kennedy v. Minarets & Western Ry. Co., 90 Cal.App. 563, 266 Pac. 353 (1928), after acknowledging the power to impose absolute liability and treble damages for fires caused by locomotives, the court sustained the imposition of treble damages for negligent fire damage, writing: "The danger from fires in a dry country like California is so great as to justify the police power of the state in imposing treble damages * * *." (90 Cal.App. at 581, 266 Pac. at 360.) A fortiori, the

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5/ Annual Fire Report for the National Forests (1966), U.S. Department of Agriculture, p. 3; Table 3, p. 1.

Federal Government as owner of the public domain may, under the property clause of the Constitution, impose absolute liability for fire suppression costs as a condition precedent to the right to acquire a right of way for electrical transmission easements through national forests.

Imposition of liability without fault, or absolute liability, is not novel to the law.[6/] Since the times of Aethelbert and Alfred the Great, the doctrine of torts was that of absolute liability. Negligence was unknown to the law until some thousand years later. "Historically, therefore, at common law, absolute liability for torts was from the earliest times not merely recognized as due process of law, it was the due process of law." Prentiss v. National Airlines, 112 F.Supp. 306, 310 (D. N.J. 1953) (emphasis in original).

Imposition of absolute liability upon railroads for damages resulting from fire has been sustained, because of difficulty of proving negligence, for well over a century. An extensive review of the history and philosophy of preceding legislation over the preceding half-century was reviewed by Justice

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6/ 2 Holdsworth, History of English Law (3d ed. 1923), p. 51; 1 Pollock & Maitland, History of English Law Before the Time of Edward I (1895) p. 31; Wigmore, Responsibility of Tortious Acts, 7 Harv. L.Rev. 441 (1894); Ames, Law and Morals (1908), 22 Harv. L.Rev. 97; Jeremiah Smith, Tort and Absolute Liability (1916-1917) 30 Harv. L.Rev. 241, 319, 409.

Gray in St. Louis & San Francisco R'y. v. Mathews, 165 U.S. 1 (1897), where the validity of Missouri's statute was sustained. Examples of the application of absolute liability are legion: Railroads have been made liable for injuries to passengers, Chicago, R.I. & Ry. Co. v. Zernecke, 183 U.S. 582 (1902); drivers of animals have been liable for damage to the highway, Jones v. Brim, 165 U.S. 180 (1897); municipalities have been liable for injuries done by mobs, Chicago v. Sturges, 222 U.S. 313 (1911); employers have been liable, irrespective of fault, for injury or death to employees occurring in employment, N.Y. Central R.R. Co. v. White, 243 U.S. 188 (1917); and absolute liability has been imposed by state workmen's compensation law, Crowell v. Benson, 285 U.S. 22 (1932).

The reasonableness of the imposition of absolute liability upon electrical power line permittees in the national forests is apparent, we submit, in view of the known facts about the danger of forest fires, the difficulties of proof, and the annual destruction which they inflict upon our forests.

II

EDISON, HAVING OBTAINED THE BENEFITS OF THE SPECIAL USE PERMIT WHEREIN IT VOLUNTARILY ASSUMED ABSOLUTE LIABILITY, IS NOW ESTOPPED FROM REPUDIATING ITS BURDENS

In the case at bar, Edison negotiated and obtained a right of way permit through a national forest. This permit contained a "high hazard" clause imposing absolute liability on

Edison for electrically caused fires. After having accepted the benefits of the contract, Edison now objects to the enforcement of this clause. This, it cannot do.

The Secretary of Agriculture was under no legal obligation to agree to Edison's use. As we have shown, Congress vested in him discretion and judgments, and the Secretary's requirement, that strict liability be assumed, is reasonable. If that liability were unacceptable to Edison, it could have rejected the agreement. As this Court reasoned in Ferry v. Udall, 336 F.2d 706, 709, note 4 (1964), cert. den., 381 U.S. 904, with regard to conditions imposed by the Secretary of the Interior for obtaining public property:

> Since the Secretary has discretionary power to refuse to sell at all, he also has the authority to set any conditions, consistent with the Act, upon which the sale may be made. Cf. Southern Pacific Co. v. Olympian Dredging Co., 260 U.S. 205, 208, 43 S.Ct. 26, 67 L.Ed. 213. If the appellants did not like the system the Secretary established for entertaining bids, their remedy was that of not bidding at all. Cf. Erie Coal & Coke Corp. v. United States, 266 U.S. 518, 45 S.Ct. 181, 69 L.Ed. 417; United States v. Weisbrod, 7 Cir. 202 F.2d 629, 633.

Similarly, in Tennessee Valley Authority v. Lenoir City, 72 F.Supp. 457 (E.D. Tenn. 1947), a city agreed to charge prescribed resale rates for power obtained from T.V.A. There, as in the case at bar, the obligor sought to avoid performance of its contractual obligation. The court disposed of the city's

argument (at 461):

> Under the property clause of the Constitution as interpreted by the United States Supreme Court, Congress may, in disposing of property, attach such reasonable conditions as are necessary for the general welfare. If the purchaser does not wish to take the property with the conditions attached by Congress, his remedy is to decline to purchase it. If he accepts the benefits of the contract, he must comply with its conditions.

Edison sought a right of way through a national forest, it signed an agreement assuming absolute liability for fire suppression costs, and it entered upon its right of way, constructed power lines and commenced transmitting electricity. It may not now challenge the validity of the agreement. Daniels v. Tearney, 102 U.S. 415, 421 (1880); Booth Fisheries Co. v. Industrial Comm., 271 U.S. 208, 211 (1926); Wall v. Parrot Silver & Copper Co., 244 U.S. 407, 412 (1917). See also United States v. San Francisco, 310 U.S. 16, 30 (1940).

III

THERE IS NO SUPPORT FOR APPELLANT'S OTHER CONTENTIONS

A. Imposition of absolute liability on Edison does not deny it equal protection of the laws. - Edison argues (Br. 18-27) that the imposition of absolute liability upon "investor-owned" utilities denies to it equal protection of the laws, because publicly owned utilities are liable only for damages caused by negligence. Edison further contends that enforcement of the

terms of the agreement amounts to a denial of due process, which it argues, amounts to the same thing because "'equal protection' is formally equally a deprival of due process of law" (Br. 20).

Thus, Edison anticipates the short answer to its equal protection argument which is, of course, that the inhibition against denial of equal protection of the laws contained in the Fourteenth Amendment refers exclusively to state action. As Chief Justice Stone observed in Detroit Bank v. United States, 317 U.S. 329, 337 (1943): "Unlike the Fourteenth Amendment, the Fifth contains no equal protection clause and it provides no guaranty against discriminatory legislation by Congress." Moreover, as applied to the facts of this case, the equal protection argument is, as observed by Justice Holmes, the "usual last resort of constitutional arguments." Buck v. Bell, 274 U.S. 200, 208 (1927).

Edison's claim that Bolling v. Sharpe, 347 U.S. 497 (1954), effectively equates equal protection with due process simply will not withstand analysis. While elements of fairness pervade both concepts, they are not coterminous. In Bolling, Chief Justice Warren wrote that "discrimination may be so unjustifiable as to be violative of due process." 347 U.S. at 499. Bolling was decided the same day as Brown v. Board of Education, 347 U.S. 483 (1954), which held that the equal protection clause forbids the states from maintaining racially segregated

public schools. In Bolling, the Court was faced with the problem in the District of Columbia where only the Fifth Amendment, which has no equal protection clause, applied. The Court held that a classification based solely on race violated due process.

Permissible classifications for purposes of equal protection have been accorded a "wide range and flexibility." Louisville Gas Co. v. Coleman, 277 U.S. 32, 37 (1928). Classifications have been upheld in the following situations: Heavier taxes imposed on banks which make loans from money of depositors rather than from other funds, First Nat. Bank v. Tax Comm'n, 289 U.S. 60 (1933); different rates on anthracite than on bituminous coal, Heisler v. Thomas Colliery Co., 260 U.S. 245 (1922); different taxes on chain stores, Tax Commissioner v. Jackson, 283 U.S. 527 (1931); tax exceptions applicable only to municipal power systems, Puget Sound Co. v. Seattle, 291 U.S. 619 (1934); higher taxes on railroads than other utilities, Ohio Tax Cases, 232 U.S. 576 (1914); taxes applicable only to commercial warehouses but not to other storage facilities in a township, Independent Warehouses v. Scheele, 331 U.S. 70 (1947); cooperatively owned as opposed to privately owned cotton gins, Corporation Commission v. Lowe, 281 U.S. 431 (1930); fire insurance rates excepting farmers mutuals, German Alliance Ins. Co. v. Kansas, 233 U.S. 389 (1914); different rates imposed upon reciprocal insurance associations than upon mutual companies, Hoopeston Co. v. Cullen, 318 U.S.

313 (1943); exclusion of osteopathic physicians from public hospitals, Hayman v. Galveston, 273 U.S. 414 (1927).7/

The validity of the imposition of absolute liability on railroads for fire communicated by their engines was sustained against the equal protection argument by the Supreme Court over 80 years ago in St. Louis & San Francisco R'y. v. Mathews, 165 U.S. 1 (1897). See also Atchison, Topeka &c. Railroad v. Matthews, 174 U.S. 96 (1899).

Equal protection forbids all invidious discrimination. It does not require identical treatment of all persons without recognition of differences in relevant circumstances. The test is whether the challenged classification is reasonably related to any proper governmental objective. Every state of facts sufficient to sustain a classification which can reasonably be conceived of as having existed when the law was adopted will be

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7/ Intimations culled from dicta in the so-called Perko cases (United States v. Perko, 133 F.Supp. 564 (D. Minn. 1955); United States v. Perko, 108 F.Supp. 315 (D. Minn. 1952), aff'd sub nom. Perko v. United States, 204 F.2d 446 (C.A. 8, 1953), cert. den., 346 U.S. 832; Perko v. Northwest Paper Co., 133 F. Supp. 560 (D. Minn. 1955); United States v. Perko, 141 F.Supp. 372 (D. Minn. 1956); Bydlon v. United States, 175 F.Supp. 891 (C.Cls. 1959)), cited by appellant (Br. 27-32), that the United States should deal fairly with persons similarly situated, are unexceptional. Edison studiously avoids meeting the real issue in this case, namely, should a company which agrees to assume absolute liability for fire suppression costs as a condition to its securing a right of way upon the public domain be held to its agreement?

assumed. Crescent Oil Co. v. Mississippi, 257 U.S. 129, 137 (1921).

We have shown that federal legislation has sanctioned imposition of absolute liability, that such liability is reasonably related to the protection of the national forests, and that Edison voluntarily assumed such liability. Edison, therefore, may not validly complain of unequal treatment.

B. The district court properly interpreted the special use permit as imposing absolute liability upon Edison. - Edison argues (Br. 14-18) that the terms of the special use permit do not impose absolute liability on it. Edison asserts that the presence of various covenants in the permit requiring it to exercise due care and to comply with state, federal and local regulations negate any intent to impose upon it absolute liability for fire suppression costs. This is not so. These covenants were included to enable the Forest Service to terminate the permit upon Edison's breach. Thus, paragraph 15 reads (R. 6):

> 15. This permit may be terminated upon breach of any of the conditions herein or at the discretion of the regional forester or the Chief, Forest Service.

These covenants, then, did not impose the standard of care requirement on Edison upon which liability was predicated. The absolute liability clause in condition No. 8 governed that. That typewritten clause, which provided (R. 7) that "The permittee shall pay the United States for all damages resulting from

this use," was expressly substituted for the printed clause imposing liability for negligence.

Condition No. 8 was clear on its face; both parties fully understood the reasons behind the inclusion of this provision. Edison, by reason of having been a party to prior litigation, was fully familiar with the concept involving imposition of costs for fire suppression. Ventura County v. Southern California Edison Co., 85 C.A.2d 529, 193 P.2d 512 (1948). The term "damage" has been interpreted to include fire suppression costs. Spokane International Ry. Co. v. United States, 72 F.2d 440, 443 (C.A. 9, 1934), cited in United States v. Chesapeake & O. Ry. Co., 130 F.2d 308, 310 (C.A. 4, 1942); Chesapeake & O. Ry. Co. v. United States, 139 F.2d 632 (C.A. 4, 1944). "The reasonable cost involved in mitigating damages is always recoverable provided it does not exceed the damages prevented or reasonably anticipated." Kleinclaus v. Marin Realty Co., 94 C.A.2d 733, 739, 211 P.2d 582, 585 (1949).

Edison's earlier (unsuccessful) attempt to have the clause deleted and its full explanation by the Forest Service dispose of all claims relating to its understanding (R. 145-146).

The district court, therefore, was clearly correct in interpreting the special use permit as imposing absolute liability on Edison.

C. Since all material issues of fact were stipulated and the only issues before the Court were issues of law, this case was ripe for summary judgment. - All of the material facts herein were stipulated (R. 165-171). The fire was electric in

source, not the result of Edison's negligence, but emanated from Edison's electric lines erected and maintained pursuant to the special use permit (R. 165). The damages for suppression of the fire were stipulated to be $8,224 (R. 166).

The only issues before the Court were questions of interpretation of written agreements. The central issue posed was as follows in the pre-trial order (R. 166):

> 9. That the claim of the United States in the above-entitled action is based upon the aforesaid Special Use Permit and is not based upon any claim that Southern California Edison Company was negligent or at fault, and that the sole issue in this litigation is whether Southern California Edison Company is liable for fire suppression damage, as proved or stipulated, by reason of its liability, without fault, pursuant to its obligations under the aforesaid contract; * * *.

Summary judgment is authorized by Rule 56(c), F.R.Civ.P., "if the pleadings, depositions, admissions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." United States v. W. T. Grant Co., 345 U.S. 629, 635 (1953); Bruce v. Travelers Insurance Company, 266 F.2d 781, 786-787 (C.A. 5, 1959). Admissions in the form of a pre-trial stipulation form the proper basis for summary judgment. Gramm v. Lincoln, 257 F.2d 250, 252 (note 1) (C.A. 9, 1958).

CONCLUSION

For the foregoing reasons, the judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF EXAMINATION OF RULES

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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